UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MR. and MRS. I., as parents and next friends of L.I., a minor,	)	
Plaintiffs	)	
v.	)	***Civil No. 04-165-P-H***
MAINE SCHOOL ADMINISTRATIVE DISTRICT NO. 55,	)	
Defendant	)	

MEMORANDUM DECISION ON MOTION TO SUPPLEMENT RECORD

Mr. and Mrs. I., as parents and next friends of L.I., a minor ("Parents"), move pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, to supplement the administrative record in the instant appeal of a decision of a Maine Department of Education hearing officer. *See* Plaintiffs' Motion To Permit Presentation of Additional Evidence, etc. ("Motion") (Docket No. 12) at 1-2; Complaint (Injunctive Relief Requested) (Docket No. 1) ¶ 1. For the reasons that follow, the Motion is granted.

I. Applicable Legal Standards

The IDEA directs that a court reviewing state educational proceedings "receive the records of the administrative proceedings" and "hear additional evidence at the request of a party[.]" 20 U.S.C. § 1415(i)(2)(B)(i) & (ii). Nonetheless, as the First Circuit has clarified, a party has no absolute right to adduce additional evidence upon request:

> . . . As a means of assuring that the administrative process is accorded its due weight and that judicial review does not become a trial *de novo*, thereby rendering the administrative hearing nugatory, a party seeking to introduce additional evidence at the district court level must provide some solid justification for doing so. To determine whether this burden has been satisfied, judicial inquiry begins with the administrative record. A district court should weigh heavily the important concerns of not allowing a party to undercut the statutory role of administrative expertise, the unfairness involved in one party's reserving its best evidence for trial, the reason the witness did not testify at the administrative hearing, and the conservation of judicial resources.

Roland M. v. Concord Sch. Comm., 910 F.2d 983, 996 (1st Cir. 1990) (citation and internal punctuation omitted).

II. Analysis

The administrative hearing in this matter was held on May 26 and 28, 2004, *see* Administrative Record ("Record") at 567, following which the hearing officer rendered a decision dated June 28, 2004 upholding the determination of Maine School Administrative District No. 55 ("School District") that L.I. was not eligible for special-education services, *see id.* at 551-58.

The Parents seek to supplement the Record by adducing (i) the testimony of Mrs. I. concerning L.I.'s continuing medical and therapeutic treatment; L.I.'s experiences, level of functioning and emotional status while not in school during the summer of 2004; and L.I.'s experiences and emotional status at the Community School at the end of the 2003-04 school year and so far this school year, (ii) the testimony of Debra Hannon, L.C.S.W., L.I.'s new counselor, concerning her counseling sessions and diagnostic impressions of L.I. in September 2004 and her impressions of L.I.'s current status and needs; and (iii) the testimony of Richard Doiron, Ph.D., to the effect that the evaluation practices used by Ellen Popenoe, Ph.D., in assessing L.I. meet the criteria for an appropriate evaluation pursuant to Maine and federal law. *See* Motion at 2-3. The Parents propose to offer the foregoing evidence either through affidavits (which they attach to the Motion) or through testimony in court or at deposition. *See id.* The School District

opposes introduction of any of the proffered supplemental evidence, *see* Opposition to Plaintiffs' Motion to Permit Presentation Of Additional Evidence, etc. ("Opposition") (Docket No. 13) at 1; however, to the extent that the testimony of either Mrs. I. or Hannon is allowed, they request that it be taken by way of deposition or in court, with the witnesses subject to cross-examination, *id*. at 6 n.3 & 7 n.4.

With respect to the testimony of Mrs. I., the Parents acknowledge that "the First Circuit has crafted a rule establishing a rebuttable presumption that witnesses who testified at the administrative hearing may not testify again in court[.]" Motion at 4 (citing *Town of Burlington v. Department of Educ.*, 736 F.2d 773, 791 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985)). However, they argue that they have rebutted that presumption by proffering testimony limited to L.I.'s post-hearing status that they contend is both relevant and fresh. *See id*. at 4-6. The School District disputes both points, asserting that the proffered testimony of Mrs. I. is similar to her testimony at hearing and, above all, simply is irrelevant to whether L.I.'s Pupil Evaluation Team ("PET") properly concluded on March 3, 2004 that L.I. did not qualify as a special-education student. *See* Opposition at 3-5.

In my view, the Parents have the better of the argument. As an initial matter, while the First Circuit has made clear that the rule permitting the taking of additional evidence in an IDEA appeal "does not authorize witnesses at trial to repeat or embellish their prior administrative hearing testimony[,]" *Burlington*, 736 F.2d at 790, Mrs. I.'s proffered testimony is not, strictly speaking, a repeat or embellishment but rather testimony concerning her child's post-hearing status – a type of testimony the First Circuit contemplates may constitute valid supplementation if relevant, *see id*. ("The reasons for supplementation will vary; they might include gaps in the administrative transcript owing to mechanical failure, unavailability of a witness, an improper exclusion of evidence by the administrative agency, and evidence concerning relevant events occurring subsequent to the administrative hearing.").

The School District relies on *Roland M.* for the proposition that "any review of PET decisions should focus on the decision as it was made at that time, based on the information before the Team at that time, rather than on information that has arisen since that date." Opposition at 5. Nonetheless, the passage of *Roland M.* on which the School District relies neither addresses a request to supplement the record nor suggests that a court must eschew post-PET or post-hearing evidence:

> Moreover, appellants' argument misperceives the focus of an inquiry under 20 U.S.C. § 1415(e)(2): the issue is not whether the IEP [individualized education plan] was prescient enough to achieve perfect academic results, but whether it was "reasonably calculated" to provide an "appropriate" education as defined in federal and state law. This concept has decretory significance in two respects. For one thing, actions of school systems cannot, as appellants would have it, be judged exclusively in hindsight. An IEP is a snapshot, not a retrospective. In striving for "appropriateness," an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated.

Roland M., 910 F.2d at 992 (citations omitted).

What is more, the Parents have cited, and my own research has unearthed, cases in which, in the context of review of decisions concerning both the adequacy of IEPs and eligibility for special services, courts have erred on the side of admitting evidence reflecting a child's post-hearing status on the theory that the proffered information might shed light on the reasonableness of (and thus be relevant to) the earlier decision. *See, e.g., R.B. v. Bartholomew Consol. Sch. Corp.*, No. 1:03-CV-0939-DFH, 2004 WL 1087367, at *2 (S.D. Ind. May 4, 2004) (noting, in context of review of IEP decision, "Evidence of R.B.'s progress after another summer of intensive therapy and education might shed light on the reasonableness of a decision a few months earlier. While the court must be wary of the clarity of hindsight, if R.B. was not ready for a mainstream program at the end of the summer, such evidence might call into question the reliability of a decision based on a judgment that R.B. had been ready for a mainstream program even earlier."); *Hanna v. Derry Sch. Dist.*, Civil No. 03-201-JD, slip op. at 4 (D.N.H. Sept. 11, 2003),

Attachment #1 to Motion (permitting parent, in context of review of objection to provision of speech and language services by certain provider, to present supplemental testimony "limited to the narrow issue of [child's] status and progress in speech and language since the administrative hearing, subject to cross examination, at a deposition to be scheduled by the parties"); *Johnson v. Metro Davidson County Sch. Sys.*, 108 F. Supp.2d 906, 915-16 (M.D. Tenn. 2000) (granting, in context of review of eligibility decision, request to admit new treatment and educational records "for the narrow and sole purpose of determining whether [child] qualified as disabled at the time of the due process hearing. Thus, subsequent manifestations of disabling traits are relevant only to the extent they confirm that a student was disabled at the time of the final decision. To the extent that the evidence demonstrates a subsequent onset of a disabling condition, it presents a new issue not before the ALJ and, thus, not ripe for determination by this Court."); Mavis v. Sobol, 839 F. Supp. 968, 978-81 (N.D.N.Y. 1993) (permitting supplementation of record to reflect child's post-hearing status in context of IEP review).[1]

Pursuant to these precedents, I will allow the proffered testimony of Mrs. I. as well as that of L.I.'s new counselor, Debra Hannon. The Hannon testimony is not cumulative; indeed, Hannon was not L.I.'s counselor as of the time of hearing and did not testify then. The Hannon testimony, like that of Mrs. I., is limited to L.I.'s post-hearing status. The testimony of both witnesses, who shall be subject to cross-

[1] In addition, in *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751 (3d Cir. 1995), cited by the Parents, *see* Motion at 5, the Court of Appeals for the Third Circuit vacated a district court judgment affirming an ineligibility decision and remanded the case for consideration of whether to admit proffered evidence bearing on the child's progress when placed in private school following the administrative hearing decision, *see Susan N.*, 70 F.3d at 754-55, 758-60. For the guidance of the lower court on remand, the Third Circuit observed: "Congress' central goal in enacting the IDEA was to ensure that each child with disabilities has access to a program that is tailored to his or her changing needs and designed to achieve educational progress. Children are not static beings; neither their academic progress nor their disabilities wait for the resolution of legal conflicts. While a district court appropriately may exclude additional evidence, a court must exercise particularized discretion in its rulings so that it will consider evidence relevant, non-cumulative and useful in determining whether Congress' goal has been and is being reached for the child involved." *Id*. at 760 (citation and internal quotation marks omitted).

examination, shall be taken at depositions to be scheduled by the parties at a mutually agreed time(s) and place(s) subject to the constraint that transcripts of both depositions shall be filed with the court by Monday, November 29, 2004.

I turn to the final question: whether to admit the testimony of Dr. Doiron. The Parents point out that for the first time in its post-hearing brief, the School District argued that the conclusions of L.I.'s neuropsychologist, Ellen Popenoe, Ph.D., should be rejected because she used a "technician" to administer portions of the testing given to L.I. *See* Motion at 7; *see also* Record at 542 & n.12 (post-hearing brief of School District contending that although Dr. Popenoe believed L.I.'s social skills were disablingly weak, Dr. Popenoe saw her for only three hours and did not even perform a great deal of her testing, thereby violating state regulations on administration of evaluations).

The Parents assert that because the post-hearing briefing was simultaneous, they did not have an opportunity to respond to this point. *See* Motion at 7-8. They seek to introduce the testimony of Dr. Doiron, a neurospychologist, to explain a resolution that was reached with (among others) the Maine Department of Education in 2001 regarding the longstanding practice of using testing assistants to complete neuropsychological evaluations. *See id*. at 8; Declaration of Richard Doiron, Ph.D., ABPP ("Doiron Decl."), Attachment # 4 to Motion.

The School District rejoins that (i) the Parents' experienced counsel are familiar with this issue and could have, but did not, seek to introduce evidence regarding it, (ii) in any event, the issue evidently played no role in the hearing officer's decision, (iii) Dr. Doiron's testimony cannot trump the language of the relevant regulation, and (iv) even if Dr. Doiron's testimony is excluded, the Parents are not precluded from citing to (and attaching a copy of) an administrative letter from Maine Commissioner of Education Susan Gendron that Dr. Doiron seeks to introduce. *See* Opposition at 7-8 & n.5; *see also* Doiron Decl. ¶ 7;

Administrative Letter No. 9, Policy Code: ILBA, dated Aug. 26, 2004 from Susan Gendron, Commissioner, to Superintendents of Schools, Special Education Directors, Attachment #5 to Motion.

The Parents note, correctly, that the fact that the hearing officer did not mention this issue would not preclude the parties from raising it or the court from considering it now. *See* Plaintiffs' Reply Memorandum in Support of Their Motion To Permit Presentation of Additional Evidence (Docket No. 14) at 6-7; *see also, e.g., Nieves-Márquez v. Puerto Rico*, 353 F.3d 108, 115 (1st Cir. 2003) ("We may affirm the judgment [in an IDEA case] on any ground supported by the record.").

Whatever the weight of the Doiron testimony – something the parties can argue in their briefs should the issue surface – I am troubled that the School District raised this issue in such a manner as to preclude a response by the Parents during the hearing proceedings. As "a hedge against injustice," *Roland M.*, 910 F.2d at 997, I will allow supplementation of the record by way of the Doiron affidavit and attached Gendron letter.

III. Conclusion

For the foregoing reasons, the Parents' motion to supplement the administrative record is **GRANTED**. The parties shall schedule depositions of both Mrs. I. and Debra Hannon, at which both witnesses shall be subject to cross-examination, at a time(s) and place(s) to be mutually agreed upon, subject to the proviso that transcripts of said depositions shall be filed with the court on or before Monday, November 29, 2004.

Briefing shall thereafter follow in accordance with the terms of the operative scheduling order (*e.g.*, the Parents' brief shall be filed within 45 days of the filing of the foregoing deposition transcripts with the court; the School District shall then submit its brief within 30 days of submission of the Parents' brief; and the Parents shall submit any reply brief within 14 days of submission of the School District's brief). *See*

Alternative Scheduling Order (Docket No. 11).

So ordered.

Dated this 27th day of October, 2004.

/S/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

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V.

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